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No. 42

In the Supreme Court of the United States

OCTOBER TERM, 1939

JOSEPH J. WEISS, MARTIN GROSS, DR. GEORGE KRUPP, AND DR. MAXIMILIAN GOLDSTEIN, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

No opinion was rendered by the trial court. The opinion of the Circuit Court of Appeals (R. 116–125) is reported in 103 F. (2d) 348.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 13, 1939 (R. 126). The petition for writ of certiorari was filed May 6, 1939,

[1] We are advised that the petitioner Dr. George Krupp has died since the granting of the writ of certiorari.

and granted June 5, 1939 (R. 126). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTION PRESENTED

This Court in granting the petition for writ of certiorari limited its review to the following question (R. 126):

Whether the trial court properly received in evidence intercepted telephone communications.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The principal statutory provision involved in this case is the second clause of Section 605 of the Communications Act of 1934, c. 652, 48 Stat. 1064, 1103–1104 (U. S. C., Title 47, Section 605). The section reads as follows, the clauses being set apart for the convenience of the Court:

Clause 1:

> No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such

communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority;

Clause 2:

and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person;

Clause 3:

and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto;

Clause 4:

and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or

for the benefit of another not entitled thereto:

Provided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

Other pertinent constitutional and statutory provisions, referred to in this brief, are printed in Appendix A, *infra*, pp. 65–69.

STATEMENT

In the United States District Court for the Southern District of New York there was returned against the petitioners and others an indictment containing twenty counts. The first nineteen counts were based on the mail fraud statute (Section 215 of the Criminal Code; U.S.C., Title 18, Sec. 338) and alleged that petitioners and their co-defendants placed and caused to be placed letters in the United States Post Office in execution of a scheme to defraud life, health and accident insurance companies by inducing these companies to pay false and fraudulent claims on policies of insurance. It was charged in the indictment, in effect, that co-defendants Nelson, Berger and Spitz[2] were policyholders who filed false and fraudulent claims with insurance companies, representing that they

[2] These defendants pleaded guilty and testified for the Government (R. 116).

were permanently and totally disabled; that co-defendant Messman[3] and petitioners Krupp and Goldstein were physicians who manufactured fictitious histories, diagnoses and ailments for these claimants in support of their claims and who instructed them how to feign such ailments when examined by insurance company physicians; that petitioner Joseph J. Weiss and co-defendant Alfred L. Weiss[4] were attorneys who advised, counseled, supervised, and financed the fabrication and presentation of the false claims to the insurance companies; and that petitioner Gross was a "chaser" who sought out and brought to the law offices of the Weiss's the three claimants for the purpose of having them file false and fraudulent claims (R. 1–20). The twentieth count alleged a conspiracy to commit the crimes charged in the first nineteen counts, in violation of Section 37 of the Criminal Code (U.S.C., Title 18, Sec. 88) (R. 20–25).

With respect to the evidence the Circuit Court of Appeals in its opinion states (R. 120):

> There can be no doubt that the government offered sufficient proof to go to the jury on all the evidence submitted.
>
> It is not questioned that Messman, Spitz, Berger and Nelson were engaged in com-

[3] This defendant also pleaded guilty and testified for the Government (R. 116).

[4] Defendant Alfred L. Weiss obtained a severance during the course of the trial owing to illness (R. 116).

> mitting frauds upon insurance companies through the filing of false claims representing that Nelson, Berger and Spitz were disabled when in fact they were not. There likewise can be no doubt that each of the appellants [petitioners herein] assisted in promoting at least some of the claims against the insurance companies. The defendant Weiss assisted in all three cases, as did Gross. The defendant Krupp gave a medical certificate in the Spitz case, the defendant Goldstein gave a certificate in the Nelson case.

Petitioners were found guilty on all counts submitted to the jury.[5] Petitioners Weiss and Gross were sentenced to imprisonment for three years on each of the substantive counts and to two years on the conspiracy count, the sentences to run concurrently (R. 30, 108, 111). Petitioners Goldstein and Krupp were sentenced to imprisonment for a year and a day on each of the counts, the sentences to run concurrently (R. 30, 109–110, 112). The Circuit Court of Appeals for the Second Circuit unanimously affirmed the judgments of conviction (R. 116–126). This Court in granting the petition for writ of certiorari limited its review, as indicated, to the question "whether the trial court properly received in evidence intercepted telephone

[5] On motion of the Government counts eight and twelve were dismissed as to all petitioners and their co-defendants (R. 28). Counts nine, ten, eleven, and thirteen were dismissed as to petitioner Krupp upon his own motion (R. 29).

communications" (R. 126), which in the case at bar are solely intrastate communications.*

In view of this limitation, there are set forth the exact circumstances under which the challenged testimony was admitted. Benjamin Nelson, a defendant who pleaded guilty and testified for the Government, identified Government's Exhibit No. 110, a typewritten transcript, corrected and initialed by himself, of a telephone conversation to which he was a party (R. 33). He was then asked whether he had heard a phonograph recording of the same conversation (R. 33). As brought out by subsequent evidence the transcript and recording had been obtained at the direction and under the supervision of Federal officers by intercepting telephone communications of some of the defend-

*Seventy-five of the communications were admittedly intrastate (Pet. 2; Br. 3). While the petitioners assert, without argument, that evidence of one intercepted telephone communication (Government's Exhibit No. 307) was introduced without proof that it was intrastate (Br. 4), they do not contend that this communication was interstate. It is apparent from the opinion of the Circuit Court of Appeals and the holding of the District Judge, in ruling upon its admissibility, that the communication was, in fact, intrastate (Opinion below, R. 119; R. below 2113–2114).

Petitioners also refer (Br. 4) to three intercepted intrastate telephone communications which they assert were put before the jury in the form of questions of the prosecutor, but were not directly placed in evidence. (See Government's Memorandum in Opposition, Footnote 1, pp. 1–2.) It should be noted, however, that this Court in granting a writ of certiorari limited its review to the admissibility of communications which were received in evidence.

ants. Before the Government offered either transcript or recording in evidence defense counsel objected on the following grounds *inter alia*: That an effort was being made "to bolster this witness by a memorandum not in evidence" (R. 33), and that "the offer * * * to elicit this testimony" violated the Fourth and Fifth Amendments, Section 605 of the Federal Communications Act and Subdivision 6 of Section 1423 of the Penal Law of New York (R. 33–34). The court overruled the objections (R. 35, 38, 44). The witness then testified that the transcript was an accurate report of the conversation (R. 35). The prosecuting attorney offered the transcript in evidence (R. 35). There was an extended colloquy, at the conclusion of which the court expressed doubt as to the competence of the transcript except to refresh the witness' recollection (R. 40). However, after ascertaining that the witness did not independently recall the exact words of the conversation (R. 36), the court permitted him to read the transcript aloud "with his memory refreshed word for word" (R. 40, 44). Although this ruling was evidently based upon the theory that the transcript could be used to refresh the witness' recollection (R. 38, 40, 44, 58, 61), the subsequent admission into evidence of the transcript and record themselves (R. 58) was apparently upon the basis, although it is not entirely clear, that the record was a memorandum of past recollection recorded and that, in any event, intrastate communications were not within the purview

of Section 605 of the Communications Act (R. 33, 36, 37, 39–40, 46–47). It was agreed that the objections to Government's Exhibit No. 110 and the ruling thereon should apply to the subsequent admission of similar testimony (R. 53, 56, 58) and thereafter stenographic transcripts and phonograph recordings were introduced without rearguing the question. (See e. g., R. 56, 58, 60, 61, 64.)

In all, 76 telephone communications were received in evidence. Both parties to 38 of these communications testified for the Government; one of the two parties to 37 of the communications testified for the Government; and with the exception of one message (Government's Exhibit 307) each communication which was received in evidence was admitted only after it had been identified by at least one of the parties thereto, such parties being four of the defendants (Stipulation, R. 129). Of the petitioners, Weiss was a party to approximately 32 communications, Gross a party to 2 and Krupp a party to 3. Goldstein was a party to none of the communications. (See certified typewritten transcript, hereinafter called R. below, Vol. I, "List of Exhibits.") It has been stipulated in this Court that interstate telephone communications were transmitted over the same wires used in transmitting the intrastate telephone communicaions which were received in evidence (R. 129).

The only telephone wires tapped were those of petitioner Weiss and co-defendant Messman. They were tapped by an officer of the New York City

Police Department at the direction of a Federal officer without any trespass upon the premises of either Weiss or Messman (R. 64–65, 67, 75, 78, 88–89). All the conversations over these wires admitted in evidence were mechanically recorded and in addition were listened to by stenographers with earphones who made stenographic transcripts of the conversations (R. 68–69, 71–74, 82–83, 86–87, 90).

Prior to trial the recordings were played in the office of the United States Attorney to the witnesses who later testified respecting them. The witnesses then made corrections in the transcripts, after comparing them with the recordings as they were played, and initialed both records and corrected transcripts (R. 34–35, 48, 54, 59–61, 63–64).

SUMMARY OF ARGUMENT

I

In *Nardone* v. *United States*, 302 U. S. 379, this Court held that Clause 2 of Section 605 of the Communications Act of 1934 prohibited Federal officers from divulging in a Federal criminal trial interstate telephone communications of defendants, which the officers overheard by means of wiretapping. The present case involves only intrastate messages. The Communications Act shows on its face that it was intended to apply only to interstate and foreign communications, and Section 605 should be construed in the light of this general pur-

pose, despite the absence of an express limitation in the second and fourth clauses of the Section. The legislative history of the Act and of Section 605 in particular shows that Congress did not intend to legislate with respect to intrastate communications. Any other interpretation does violence to the order and logic of the various clauses of the section, and produces inconsistencies and absurdities in the operation of the Section.

Nor can it be assumed that Congress thought it necessary to forbid the divulging of intrastate communications in order to protect the secrecy of interstate and foreign communications, for there is no difficulty in dealing with each type of communication separately. Although it might be said that *interception* of interstate messages could not easily be prohibited without also forbidding interception of intrastate messages passing over the same lines, it is clear both from the language used and the legislative history that Section 605 does not prohibit interception *per se* but only interception *and* divulging.

Petitioners urge that even if Section 605 does not or cannot forbid the interception and divulging of intrastate messages, nevertheless the policy against wire-tapping should be given effect by construing the Section as laying down a rule of evidence. But there is no basis either in the statute or in the *Nardone* decision for such a view. That decision merely gives effect to an express statutory prohibi-

tion against certain disclosures. It is evident from the opinion that this Court regarded the statute as operating on the Federal officers who were testifying, not on the trial court in the admission of evidence.

The *Nardone* decision should be limited to its facts and not extended to intrastate communications. Ninety-eight ~~and one half~~ percent of all telephone communication is intrastate, and serious practical and constitutional difficulties will arise if the *Nardone* decision is extended to this wide new field. The immunity granted by the Act, as construed in that decision, is broader than the constitutional guarantee of the Fourth Amendment, since not even reasonable "searches" are permissible. Also, under the general language of Section 605, a defendant might have such evidence excluded even when obtained by private persons unconnected with the Government (cf. *Burdeau* v. *McDowell*, 256 U. S. 465) or where the evidence was secured by intercepting some other person's messages (cf. *Hale* v. *Henkel*, 201 U. S. 43; *Agnello* v. *United States*, 269 U. S. 20, 35). If constitutional, the Section thus construed would forbid evidence of intercepted *intrastate* communications by *state* officers in *state* prosecutions, although a state constitution or statute may specifically make such evidence admissible. Section 605 should be construed to avoid doubts as to its constitutional validity.

II

Even if Clause 2 of Section 605 were held applicable to intrastate communications, it was not violated in this case, because the clause prohibits divulging only by persons "not authorized by the sender." The witnesses who testified to the telephone messages in the trial court were parties to the conversation. It should be sufficient that one participant in a telephone conversation authorizes divulgence of the message.

III

Interception of telephone communications by Federal law enforcement officers does not violate the Fourth or Fifth Amendments. The *Olmstead* decision (*Olmstead* v. *United States*, 277 U. S. 438), is controlling and should not be overruled. It has been approved by distinguished commentators and is supported by principles and considerations of public policy. To hold wire tapping unconstitutional would probably preclude Congress from effectively legislating on the subject, whereas this Court has several times indicated that the matter is one of legislative policy.

IV

There was no violation of New York state law in the present case, since the right of law enforcement officers to tap wires has been recognized in at least one New York decision. Even if the state law were violated, the evidence in the instant case

was properly admitted under the common law rule that evidence, although procured illegally, is, nevertheless, admissible. This common law principle was reiterated in the *Olmstead* decision, and there has been no change in conditions since that decision which would justify the adoption of a different rule.

V

Since the telephone conversations in question were introduced through the testimony of parties thereto, strictly speaking there exists in the present case no question of "wire-tapping." These witnesses did not tap any wires and did not derive their information from wire-tapping. Use of stenographic transcripts and phonographic recordings obtained by wire-tapping to refresh the recollection of parties to the conversations was not reversible error since a refreshing memorandum need not itself be admissible. Error, if any, in admitting the transcripts and recordings was not prejudicial where such witnesses had previously testified to the messages.

ARGUMENT

I

THE SECOND CLAUSE OF SECTION 605 OF THE COMMUNICATIONS ACT OF 1934 DOES NOT APPLY TO INTRASTATE TELEPHONE COMMUNICATIONS

The primary objection urged by the petitioners in the trial court against the introduction of the

intercepted intrastate telephone communications was that their admission was prohibited by Clause 2 of Section 605 of the Communications Act of 1934. This clause reads as follows:

> no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person.

The fundamental question involved is whether this clause applies to *intrastate* telephone communications.

The Circuit Court of Appeals in the instant case held that the decision of this Court in *Nardone* v. *United States*, 302 U. S. 379, construing this clause, applied only to interstate communications. It further held that not only the context of the Act but Section 605 itself, when examined as a whole, makes it manifest that the second clause of the Section applies only to interstate and foreign communications.

The view that the second clause of Section 605 does not apply to intrastate communications is supported by the decision of the Circuit Court of Appeals for the First Circuit in *Valli* v. *United States*, 94 F. (2d) 687, and by the decision of the District Court for the Eastern District of Missouri in *United States* v. *Bianco* (unreported, decided January 13, 1938; printed in Appendix B, *infra*, p. 70). The contrary view has been expressed by the Circuit Court of Appeals for the Sixth Circuit in a

per curiam opinion upon rehearing in *Diamond* v. *United States* (unreported, decided April 11, 1938),[1] by the Circuit Court of Appeals for the Third Circuit in *Sablowsky* v. *United States*, 101 F. (2d) 183,[2] and by the United States District Court for the District of Columbia in *United States* v. *Plisco*, 22 F. Supp. 242. See also the opinion of the dissenting judge in the *Valli* case, *supra*.

We submit that the Circuit Court of Appeals in the instant case was correct in deciding that the second clause of Section 605 does not apply to intrastate communications.

A. The second clause of Section 605 should be construed in the light of the avowed purpose of the statute to regulate interstate and foreign communication by wire or radio

Petitioners rely upon the facts that the second clause of Section 605 refers to "any communication" and that, while the first and third clauses of the Section contain the words "interstate or foreign communication," these words are omitted from the second and fourth clauses. From this they argue that Congress intended to make the

[1] The court's principal decision (94 F. (2d) 1012) does not discuss the question. The unreported opinion of the court denying the Government's petition for rehearing is quoted at pages 28–30 of the petition for writ of certiorari herein.

[2] See also *United States* v. *Klee*, 101 F. (2d) 191, which was decided by the Circuit Court of Appeals for the Third Circuit on the same day upon the authority of its prior decision in the *Sablowsky* case.

second and fourth clauses applicable not only to interstate and foreign communications but also to intrastate communications.

This contention ignores the avowed purpose of the legislation, as disclosed on the face of the statute. The title of the Act indicates clearly that its purpose is "the regulation of interstate and foreign communication by wire or radio" (48 Stat. 1064). Section 1 of the Act (48 Stat. 1064; U. S. C., Title 47, Sec. 151) provides in part that "For the purpose of regulating interstate and foreign commerce in communication by wire and radio" and "for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication," there is created a commission to be known as the Federal Communications Commission. Section 2 (a) (48 Stat. 1064; U. S. C., Title 47, Sec. 152) provides that "The provisions of this Act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio * * *." Section 2 (b) (48 Stat. 1065; U. S. C., Title 47, Sec. 152) provides that "Subject to the provisions of section 301,* nothing in this Act shall be construed

Section 301, so far as pertinent, provides that " * * No persons shall use or operate any apparatus for the transmission of energy or communications or signals by

to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service of any carrier * * *."[10] These provisions, we submit, are not at all ambiguous and clearly show that the purpose of Congress was to regulate only interstate and foreign communication by wire or radio, except where it otherwise expressly indicated.

It may also be pointed out that while Section 3 of the Act (48 Stat. 1065; U. S. C. Title 47, Sec. 153) gives definitions of the terms "wire communication," "radio communication," "interstate communication," and "foreign communication," which are used throughout the Act, there is incorporated therein no definition of the word "communication," although that word is used in Clause

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radio * * * (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; * * * except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act." (48 Stat. 1081 U. S. C., Title 47, Sec. 301).

[10] See also Sections 3 (e) and (f), 4 (k), 201 (a), 203 (a), 221 (b), 301, 313, 406, 503, and 606 (b); 48 Stat. 1065, 1068, 1070-1071, 1080, 1081, 1087, 1095, 1101, 1104; U. S. C., Title 47, Secs. 153 (e) and (f), 154 (k), 201 (a), 203 (a), 221 (b), 301, 313, 406, 503, 606 (b).

2 of Section 605. It would seem to follow that if Congress had intended by the use of the word "communication" in Clause 2 of Section 605 to refer to any communication other than one of the types defined, it would have incorporated in Section 3 a separate definition of the word "communication." Its failure to do so indicates that Congress felt that it had defined every type of communication with which it was concerned. Hence there is no occasion to attribute to the words "any communication," when used in Clause 2 of Section 605, a meaning which would embrace any communication other than an interstate or foreign communication.

If, as we submit, it was the purpose of Congress by the Communications Act to regulate only interstate and foreign communication by wire or radio, the construction which should be given any part of the Act is one which should be founded upon and in harmony with the avowed purpose of the legislation. *Nashville Ry.* v. *Tennessee,* 262 U. S. 318, 323; *Robinson* v. *Balt. & Ohio R. R.,* 222 U. S. 506, 511.

But the petitioners contend, in effect, that the "wire-tapping provisions" of Section 605 are not regulatory provisions because they do not concern the Commission or its jurisdiction or regulatory powers. For this reason, they assert that these provisions of Section 605, not being regulatory in character, cannot properly be limited to interstate and foreign communications, as are the regulatory

provisions. The argument is based upon the erroneous assumption that only those provisions of the Act which the Commission is specifically given jurisdiction to execute and enforce may properly be denominated as regulatory in character. Obviously, Congress can regulate by legislation which operates directly upon the subject matter as well as through an administrative agency. Section 1, *supra,* makes it manifest that the broad intent and purpose of the Communications Act is to regulate interstate and foreign commerce in communication by wire and radio and that the Federal Communications Commission was created merely to aid in effecting that purpose. Therefore, even assuming that the so-called "wire-tapping" provisions of Section 605 are not within the regulatory powers of the Commission, they nevertheless constitute direct regulation by Congress of interstate commerce in communication by wire or radio, since they are positive prohibitions, fortified by penal sanction,[11] designed to prevent abuse of such commerce.

B. Petitioners' interpretation of Section 605 would result in a strained construction of this section and would cause inconsistencies in its application

In urging that the second and fourth clauses of Section 605 relate to intrastate as well as interstate and foreign communications, although the first and

[11] See Section 501 of the Act (48 Stat. 1100 (U. S. C., Title 47, Sec. 501)).

third clauses admittedly are concerned only with interstate and foreign communications, the petitioners have advanced a construction which, we submit, would result in inconsistencies in application between the several clauses of the Section.

The first clause, in substance, prohibits the unauthorized divulgence of any "interstate or foreign communication by wire or radio" by persons permitted to receive or transmit the same.[12] The second clause, the one here in question, provides that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person." The third clause states that "no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto". The fourth clause provides that "no person having received such intercepted communication or having become acquainted with the contents * * * thereof, knowing that such information was so obtained, shall divulge * * * or

[12] In the *Nardone* case this Court said (pp. 380–381) that this clause "provides that no person who, as an employe, has to do with the sending or receiving of any interstate communication by wire shall divulge or publish it or its substance to anyone" other than to certain enumerated persons or under certain enumerated circumstances.

use the same * * * for his own benefit or for the benefit of another not entitled thereto".

Petitioners' interpretation is based upon an artificial segregation of the so-called "interception" clauses of Section 605 (Clauses 2 and 4) which, they argue, are not limited to interstate and foreign communications. But any argument based on such a grouping of the clauses fails, since clause 3, which applies to any "person not being entitled thereto [who] shall receive * * * any * * * communication" also clearly includes interceptors and is expressly limited to interstate and foreign communications. If it be recognized, further, that clause 4 relates only to *third persons* receiving information from prohibited sources (else clause 2 would be rendered superfluous), the following results flow from petitioners' interpretation:

> 1. The interceptor of an intrastate communication may not divulge it [clause 2], but he is not forbidden to use the information for his own benefit or for the benefit of other persons [clause 3 being expressly limited to interstate and foreign communications, and clause 4 being limited to third persons].
>
> 2. An employee of a transmitting agency is not forbidden to use or publish intrastate communications [clauses 1 and 3 being expressly limited to interstate and foreign communications; clause 2 to interceptors; and clause 4 to third persons], but a third person "having become acquainted" with the contents of the communication from

such an employee may not use or publish it (Clause 4).

Such astounding results can be avoided by construing all clauses of Section 605 to relate only to interstate and foreign communications. As the Government sees it, the difference between clauses 2 and 3 is not that they apply to mutually exclusive classes of persons (i. e., receivers and interceptors) or to different types of communications (i. e., intrastate or interstate), but that they merely forbid different abuses. In this light the clauses of the section can be read in logical sequence as they are written, to form a simple and consistent scheme. Clause 1 prohibits publication by employees of transmitting agencies. Clause 2 prohibits publication by an interceptor. Clause 3 prohibits employees and interceptors from using wrongfully obtained information. Clause 4 merely extends the prohibitions of the first three clauses to third persons, forbidding them from divulging or using information derived from prohibited sources.

Moreover, it is not logical to assume that Congress, without express declaration, intended within a single short section of the Communications Act to legislate with regard to two distinct subjects, i. e., regulation of interstate and foreign communications and regulation of intrastate communications. That it was dealing with interstate and foreign communications is, of course, apparent from clauses 1 and 3. There is no basis, other

than the absence of the words "interstate and foreign" in clauses 2 and 4, for supposing that Congress, without any indication of such an intention, suddenly decided to legislate with reference to an entirely new field of communication. Had Congress intended so to enlarge the subject matter to be regulated it would have stated its intention in express language.[13] And one would have expected to find all provisions relating to the same subject matter together, whereas petitioners' interpretation forces the clauses of the section into a disjointed erratic progression: Congress limits itself to interstate and foreign commerce in clause 1, expands its interest to include intrastate commerce in clause 2, reverts to the original limitation in clause 3, and in the 4th clause once more deals with the subject matter of the second preceding clause—all without one word to indicate so vacillating a legislative intent.

No valid argument, we submit, can rest upon Congress' failure to repeat the words "interstate and foreign" in clauses 2 and 4, when this limitation had already been clearly stated in clauses 1 and 3. The draftsmen of the Act evidently believed that the limitation to "interstate and foreign" communications stated in clause 1 carried over

[13] In the one isolated instance in the Communications Act in which Congress attempted in any wise to regulate intrastate communications, it did so in express language. See Section 301 of the Communications Act, the pertinent portions of which are copied in footnote 9, *supra*, pp. 17–18.

without the necessity of repetition to clause 2, since the first two clauses both deal with publication. The limitation to "interstate and foreign" communications is restated in clause 3 only because this is the first point at which "use" of information is prohibited.

C. The legislative history of Section 605 shows that it was intended to apply only to interstate and foreign communications

While we submit that analysis of Section 605, together with examination of other provisions of the Communications Act, show that the section applies only to interstate and foreign communications, there is admittedly a divergence of judicial opinion upon the question (*supra*, pp. 15–16), with the result that reference to the legislative history of the section is warranted. See *United States* v. *Katz*, 271 U. S. 354, 357; *Prussian* v. *United States*, 282 U. S. 675, 678. In considering the legislative history of the section this Court may, of course, "refer to the purpose and scope of the Act from which it was derived." *United States* v. *Mason*, 218 U. S. 517, 525; see also *Logan* v. *United States*, 144 U. S. 263, 302; *United States* v. *Le Bris*, 121 U. S. 278; *McDonald* v. *Hovey*, 110 U. S. 619.

The legislative history discloses that the primary intent and purpose of Congress in passing the Communications Act of 1934 was merely to transfer administrative jurisdiction over enforcement of

the then existing regulatory measures with reference to *interstate and foreign communication* by wire or radio. Thus, the President in his message to Congress on February 26, 1934, recommending the passage of the bill which eventually became the Communications Act of 1934 stated:

> I recommend that the Congress create a new agency to be known as the Federal Communications Commission, such agency to be vested with the authority now lying in the Federal Radio Commission and with such authority over communications as now lies with the Interstate Commerce Commission * * *. (S. Doc. 144, 73d Cong., 2d Sess.)[14]

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[14] The above message was apparently based upon the recommendations of an interdepartmental committee appointed by the President in the latter part of 1933 to study the entire communications system in the United States and to recommend necessary legislation. Associated with this committee in an advisory capacity were Senator Dill, Chairman of the Senate Committee on Interstate Commerce, and Representative Rayburn, Chairman of the House Committee on Interstate and Foreign Commerce. In a report filed on January 23, 1934, this Committee found that the "huge volume of intrastate traffic (which) comprises about 98¼ percent of the total telephone traffic * * *)" was subject to the authority of "State and municipal regulatory commissions." It accordingly made no recommendation with respect to legislation affecting intrastate telephone communication. It did find, however, that there was "need of effective governmental regulation of the interstate and foreign aspects of commercial communication", and recommended "the transfer of existing diversified regulation of communications to a new or single regulatory body, to which would be committed any further Federal control of two-way com-

And the Senate Committee on Interstate Commerce in its report submitting the bill to that body said:

> The purpose of this bill is to create a communications commission with regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio. * * * This bill is so written as to enact the powers which the Interstate Commerce Commission and the Radio Commission now exercise over communications, * * *. [S. Rept. No. 781, 73d Cong., 2d Sess., pp. 1, 2].[15]

munication and broadcasting." (See Senate Committee Report, 73d Cong., 2d Sess., entitled "Study of Communications by an Interdepartmental Committee," U. S. Govt. Printing Office, 1934, pp. 1, 6, 9.)

[15] At the hearings before the Committee on Interstate Commerce of the Senate on S. 2910, 73d Cong., 2d Sess., which was the predecessor of the above bill, held on March 1934, the Chairman of this Committee, Senator Dill, at page 1, said: "This meeting has been called to hold hearings on Senate bill 2910, a bill to provide for the regulation of interstate and foreign communications by wire or radio, and for other purposes. It is a bill that has been prepared to carry out the desires of the President, primarily, in his message to Congress, to combine the regulatory powers now exercised in the Interstate Commerce Commission and Radio Commission over communications."

In explaining to the Senate the effect of the bill which became the Communications Act, Chairman Dill stated:

"The bill * * * simply writes into law the existing provisions relating to the control of the telephone and telegraph business now contained in the Interstate Commerce Act, and the provisions of the radio law * * * now

If, as the foregoing excerpts clearly disclose, the Communications Act of 1934 was not intended to change or enlarge the field in which "existing law" operated, we submit that Section 605 should not be so construed as to include intrastate communications since the "existing law" was clearly confined in its operation to interstate and foreign communications. The Communications Act of 1934 was based upon the Interstate Commerce Act of February 4, 1887, c. 104, 24 Stat. 379, as amended by the Act of June 18, 1910, c. 309, 36 Stat. 539, and the Radio Act of February 23, 1927, c. 169, 44 Stat. 1162, neither of which dealt with intrastate communications.

That the Interstate Commerce Act did not apply to intrastate communications is apparent from the following language in Section 7 of the Act of June 18, 1910 (36 Stat. 545):

> the provisions of this Act shall not apply * * * to the transmission of messages by telephone, telegraph, or cable wholly within one State and not transmitted to or from a

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being enforced by the Federal Radio Commission." (78 Congressional Record, 73d Cong., 2d Sess., p. 4138–4139.)

A similar explanation of the bill was given to the House by Chairman Rayburn:

"* * * the bill as a whole does not change existing law, not only with reference to radio but with reference to telegraph, telephone, and cable, except in the transfer of the jurisdiction and such minor amendments as to make that transfer effective." (Id., p. 10313.)

See also H. Rep. No. 1850, 73d Cong., 2d Sess., p. 3.

> foreign country from or to any State or Territory as aforesaid.

It also seems evident that the Radio Act of 1927 did not extend to intrastate communications. Section 1 of that Act (44 Stat. 1162) states "That this Act is intended to regulate all forms of interstate and foreign radio transmissions and communications * * *." This limitation upon the application of the Act was also expressed by Congressman White, Chairman of the House Merchant Marine and Fisheries Committee, in reporting on the bill:

> At the very outset the bill asserts Federal jurisdiction over all phases of radio communication in so far as such communication constitutes or affects interstate or foreign commerce. This is but declaratory of existing law * * *. (67 Cong. Rec. 5479.)

The "existing law" to which the Chairman referred was the Radio Act of August 13, 1912, c. 287, 37 Stat. 302, in which Section 1 declares, with unmistakable clarity, that (37 Stat. 302):

> nothing in this Act shall be construed to apply to the transmission and exchange of radiograms or signals between points situated in the same State * * *.

Since the Communications Act of 1934 merely transferred to the newly created Federal Communications Commission the powers then residing in the Interstate Commerce Commission and in the

Radio Commission, and since the provisions of the Interstate Commerce Act and the Radio Act of 1927 were intended in no way to affect intrastate communications, we submit that Congress in enacting the Communications Act of 1934 similarly did not intend in any way to embody therein any provisions affecting intrastate communications.

With specific reference to Section 605, the Committee reports show that this section merely carried over the provisions of Section 27 of the Radio Act of 1927 into the Communications Act of 1934, and there applied those provisions to wire communications as well as radio. That such was the only purpose of Congress in enacting Section 605 is apparent from the following Committee statements:

> Section 605 * * * is based upon section 27 of the Radio Act and extends it to wire communications. (S. Rept. 781, 73d Cong., 2d Sess., p. 11).
>
> Section 605 * * * is based upon section 27 of the Radio Act, but is also made to apply to wire communications. (H. Rept. 1850, 73d Cong., 2d Sess., p. 9.)

This, we submit, completely refutes any contention that it was the intention of Congress to extend Section 605 to intrastate communications.

Moreover, it should be particularly noted that the language of clause 2 of Section 605, which is the only clause involved in the instant case, is substantially identical, except for one word, with the

language of clause 2 of Section 27 of the Radio Act of 1927.[15] The only change made when Congress reenacted this clause in the Communications Act was the substitution of the word "communication" for the word "message." It is apparent from the legislative history, heretofore recited, that Section 27 of the Radio Act referred only to interstate and foreign communications. It follows that, unless from the substitution of the word "communication" for the word "message" an intent on the part of Congress to extend the scope of the clause to include intrastate communications can be shown, it must continue to embrace only interstate and foreign communications. However, the legislative history of the Communications Act shows that this change was made in response to a suggestion by the Interstate Commerce Commission, which sought the change solely because the word "message," as distinguished from the word "communication," was not defined in the bill.[16] It is therefore appar-

[15] The second clause of Section 27 of the Radio Act of 1927 (Appendix A, *infra*, p. 66) reads: "no person not being authorized by the sender shall intercept any *message* and divulge or publish the contents, substance, purport, effect, or meaning of such intercepted *message* to any person * * *." [Italics ours.]

[16] In its letter dated March 16, 1934, to Senator Dill, Chairman of the Senate Interstate Commerce Committee, the Interstate Commerce Commission said:

"The word 'messages' is used in several places in the bill * * *. Either the word 'messages' wherever used should be changed to 'communication,' or 'messages' should be defined in this section" [Section 3]. (Hearings on S. 2910,

ent that the substitution of the word "communication" for the word "message" was a mere formal act, and does not justify any conclusion or inference that Congress by such substitution intended to extend the scope of the clause to embrace intrastate communications. In the absence of such an intent, we submit that the language of clause 2 has not assumed a different meaning from that which it originally had, but continues to embrace only interstate and foreign communications. Consequently there is no merit in the petitioners' contention that the words "any communication" include intrastate communications.

D. It is not necessary that the second clause of Section 605 be applied to intrastate communications in order to render effective the statutory prohibition against the disclosure of interstate communications

Petitioners contend that it is necessary to prohibit both the interception and divulgence of all communications in order to assure the privacy of interstate communications. They point out that if interception of intrastate messages were permitted, there could be no way of preventing interception of interstate messages. The petitioners' contention is based upon the false premise that clause 2 of Section 605 prohibits not only divulgence but also interception as such. However, as

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73d Cong., before Senate Committee on Interstate Commerce, p. 201; hearings on H. R. 8301, 73d Cong., before Committee on Interstate and Foreign Commerce of House of Representatives, p. 89.)

held by the Circuit Court of Appeals (R. 118), there is no prohibition of interception without more. Obviously, if this be true, the second clause was really directed at unauthorized divulging and does not attempt to assure secrecy insofar as it may be invaded by mere interception. Of course, it was not necessary for Congress to prohibit the disclosure of both intrastate and interstate messages in order to prevent the disclosure of interstate messages alone. It cannot be said, therefore, that prevention of disclosure of intrastate communications is necessary to render effective the prohibition against the disclosure of interstate communications.

That the second clause of Section 605 is aimed at unauthorized divulging rather than interception as such appears from the language of the clause itself. It should be noted that the clause employs the conjunctive and not the disjunctive. It reads: "No person * * * shall intercept *and* divulge * * *." Interception is therefore coupled with publication and it is the combination of both which is prohibited. There can, therefore, be no violation of the clause without publication.

That the purpose of the language quoted was to prohibit unauthorized publication rather than interception *per se* also appears from the title of Section 605, from other clauses of the Section and from the Committee Reports. Section 605 is entitled "Unauthorized Publication of Communications" (48 Stat. 1103), and it is manifest that the other clauses of the Section are specifically directed

only at unauthorized publication or use. Indeed, the Committee Report refers to the forbidden act, in explaining the purpose of Section 605, by the single word "publication":

> Section 605, prohibiting unauthorized publication of communications, is based upon section 27 of the Radio Act * * * (S. Rept. No. 781, 73d Cong., 2d Sess., p. 11; H. Rept. No. 1850, 73d Cong., 2d Sess., p. 9).

Further light is shed upon the intent of Congress to limit the scope of Section 605 to unauthorized publication by reference to the background of the Radio Act of 1912 and to the language of Regulation Nineteenth of Section 4 thereof.[18] The Radio Act of 1912 was adopted to implement a treaty, signed at Berlin in 1906 and ratified by the Senate of the United States in 1912 (37 Stat., pt. 2, p. 1565), obligating the United States to assure the secrecy of certain wireless communications.[19] (H. Rept.

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[18] Section 27 of the Radio Act of 1927 (from which Section 605 is drawn) was based on Regulation Nineteenth of Section 4 of the Radio Act of 1912 (copied in Appendix A, *infra*, pp. 66–67). H. Rept. 404, 69th Cong., 1st Sess., pp. 1, 4, accompanying H. R. 9108, 69th Cong., 1st Sess. Section 15 of H. R. 9108 is identical with Section 27 of the Radio Act of 1927.

[19] The Chairman of the House Committee on Merchant Marine and Fisheries, who was in charge of the bill which became the Radio Act of 1912, in the course of debate on Regulation Nineteenth of Section 4 thereof, said: "I will call the gentlemen's attention to the fact that this relates to secrecy of messages and is required by the Berlin convention, and we are simply carrying out the provisions of that convention to which we became a party by the action of the Senate" (48 Cong. Rec. 10593).

582, 62d Cong., 2d Sess., p. 16.) Nevertheless, the Senate Committee Report, with respect to the Bill which became the Radio Act of 1912 stated: "The bill does not interfere in any way with the *hearing* of messages by amateurs at all times and all places as they may elect." (Italics ours.) (S. Rept. 698, 62 Cong., 2d Sess., p. 14.) Moreover, the Nineteenth Regulation of Section 4 of the Act itself discloses on its face that it is concerned only with unauthorized "divulging or publishing" of wireless messages (Appendix A, *infra*, pp. 66–67).

E. Section 605 is not a "rule of evidence" statute nor was it construed as such in the Nardone decision

Petitioners contend that the second clause of Section 605 embodies a rule of evidence applicable as well to intrastate as to interstate and foreign communications. Apparently in support of this contention they cite the *Nardone* decision.

While the effect of the decision of this Court in the *Nardone* case was to render inadmissible in a Federal criminal prosecution interstate telephone communications intercepted by Federal officers, it must be pointed out that neither the statute nor the *Nardone* decision lays down a rule of evidence *per se*. It is apparent that, so far as the statute is concerned, there is no language which states that intercepted communications may not be received in evidence. The statute is not directed to the judicial processes but instead declares that such communi-

cations shall not be divulged to "any person." In addition, there is not a word in the *Nardone* opinion to support the view that the second clause of Section 605 establishes a rule of evidence, nor is there the slightest indication in the Court's opinion that it was exercising a power, recognized in *Funk* v. *United States,* 290 U. S. 371, to declare, independently of the statute, a common law rule of evidence which will exclude intercepted communications. It is evident from the opinion that the Court's problem was solely one of statutory construction, i. e., whether the language of the second clause was broad enough to include a divulgence by Federal officers in a Federal court of intercepted interstate telephone communications. There is no basis whatever in the opinion for believing that the Court was of the view that intercepted *intrastate* communications should be barred upon any theory as to a rule of evidence without regard to whether the second clause of Section 605 extends to intrastate communication.

But conceding *arguendo* that a rule of evidence as such is embodied in the second clause of Section 605 as construed by this Court in the *Nardone* case, we nevertheless submit that the application of such a rule must be confined to interstate and foreign communications. As we have previously demonstrated, the language of the Act and the legislative history show that the second clause of Section 605 was not intended to embrace intrastate communications, and there is no justification for giving it

a different interpretation, even if the clause be regarded as creating a rule of evidence.

F. The Nardone decision should be limited to its facts and not extended to intrastate communications

The only communications involved in the *Nardone* case were interstate.[20] As this Court has fre-

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[20] This Court, in reciting the facts involved in the *Nardone* case, stated in its opinion (p. 380):

"Over the petitioners' objection and exception federal agents testified to the substance of petitioners' interstate communications overheard by the witnesses who had intercepted the messages by tapping telephone wires. * * *"

The Circuit Court of Appeals for the Second Circuit, the court whose decision was reviewed in the *Nardone* case, said in its opinion in that case (90 F. (2d) 630, 632):

"We take it for granted that this [Section 605] refers only to interstate and foreign messages. * * *"

And in its opinion in the present case, that court said with reference to its decision in the *Nardone* case (R. 117):

"There [in the *Nardone* case], both interstate and intrastate telephone messages were intercepted through wire tapping and used as proof in a criminal trial. We held that under Section 605 of the Federal Communications Commission Act (U. S. C., Title 47, Chapter 5, § 605) interstate communications were not inadmissible and assumed that the act did not cover the intrastate messages. The Supreme Court reversed our decision on the ground that the use of interstate messages as evidence was essentially forbidden by the clause of § 605, supra, which provides that: 'no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person.'

"In reaching the above conclusion it cannot be supposed that the Supreme Court was intending to deal with anything but the admissibility of interstate communications,

quently pointed out, "What was said in the opinion must be limited, under well-known rules, to the facts and issues involved in the particular record under investigation." *Ger. Alliance Ins. Co.* v. *Home Water Co.*, 226 U. S. 220, 234; see also *Wisconsin* v. *Lane*, 245 U. S. 427, 435; *Coleman* v. *Miller*, No. 7, October Term, 1938, decided June 5, 1938.

In the present case petitioners ask the Court to extend to intrastate communications the rule which the *Nardone* case laid down for interstate communications. Since 98¼ percent of all telephone communication is intrastate [21] a proposal to extend the *Nardone* decision to so vast a field justifies the Government in pointing out the serious implications of such an extension. In the *Nardone* opinion the Court indicated that it was not concerned with Congressional intent as revealed by legislative history since the language of the statute was plain. Nevertheless, since the legislative history clearly shows that the language employed by Congress was inadvertently [22] broader than the

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for they were the only messages, the reception of which we had treated as open to doubt."

[21] See Study of Communications by an Interdepartmental Committee, p. 9, 73d Cong., 2d Sess., U. S. Govt. Printing Office, 1934.

[22] It should be noted that when Congress, subsequent to the *Nardone* decision, turned its attention to the subject of wire tapping by Federal officers, vigorous debate ensued (83 Cong. Rec. 9462, 9635), in marked contrast to the com-

legislative intent, this Court may well hesitate to extend the doctrine to new situations, plainly beyond the intended scope of the statute and not expressly covered in the opinion. Particularly should this be the case where strong policy considerations oppose such an extension.

One unfortunate effect of clause 2 of Section 605 as interpreted in the *Nardone* decision is that it precludes any procedure analogous to the issuance of a warrant to authorize a Government investigator to make this type of search. One's person, house, papers, and effects may be subject to reasonable search under a warrant issued "upon probable cause" (U. S. C., Title 18, Sec. 613), although these are within the explicit protection of the Fourth Amendment. Yet, as an incidental effect of the Federal Communications Act, telephone communications, although not within the protection of the

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plete silence on this subject at the time of passage of the Federal Communications Act. A bill, S. 3756, 75th Cong., 3d Sess., was introduced to amend Section 605 of the Federal Communications Act to permit interception of telephone communications by Government investigators upon authorization by the head of the investigating agency. This bill passed the Senate and was approved by the House with an amendment imposing special penalties on an investigator who intercepted telephone communications without his superior's authority. Although both houses thus expressed themselves in favor of taking Federal investigations out of the operation of Section 605, the bill died when the Senate failed in the closing hours of the session to take up the House amendment for consideration.

Fourth Amendment, are given an absolute immunity from reasonable search and seizure. This immunity would extend not only to the overhearing of self-incriminating statements relating to crimes previously committed, but even to situations where the very use of the telephone is part of a criminal act. Such is the case where telephone communications constitute overt acts in carrying out a criminal conspiracy. The Court would be faced with an even more striking illustration if a defendant, charged with "unlawfully disclosing information affecting national defense" (U. S. C., Title 50, Sec. 32) via the telephone or radio, were to use the Federal Communications Act to shut out the evidence of law officers who apprehended him *flagrante delicto*. It is unnecessary to expand upon the practical difficulties in law enforcement which would arise under such a construction.

Moreover, if Section 605 is a rule of evidence in the Federal courts, it would seem to exclude testimony from intercepted telephone communications although they had been procured by private persons unconnected with the Government and although they might be communications of a person other than the defendant. Yet in *Burdeau* v. *McDowell*, 256 U. S. 465, this Court held that the Government might avail itself of evidence unlawfully seized by private persons, and in many cases it has been held that a defendant cannot complain of a violation of the constitutional rights of third persons. See, for example, *Hale* v. *Henkel*, 201 U. S. 43, 70;

Agnello v. *United States*, 269 U. S. 20, 35.[23] Congress, of course, was not bound by policy considerations in these decisions, but it is difficult to believe that Congress intended to undo the effects of the *Burdeau* and *Hale* cases, as well as the *Olmstead* case (*Olmstead* v. *United States*, 277 U. S. 438), by Section 605 of the Federal Communications Act.

The extension of the doctrine of the *Nardone* case to intrastate communications involves further difficulties in addition to those already pointed out. If the Federal Communications Act were so construed, its provisions would seem to override provisions like Article 1, Section 12, of the New York State Constitution, which became effective January 1, 1939, permitting interception under search warrant,[24] or the section of the Louisiana wire-tapping statute specifically exempting law enforcement offi-

[23] In this connection it should be observed that no intercepted telephone call to which petitioner Goldstein was a party was introduced (see p. 9, *supra*).

[24] "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

"The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof." Constitution of 1938, Article I, Sec. 12. Ap-

cers from the general prohibition. Louisiana Code of Criminal Procedure, Art. 1183. For, since there is no word of limitation to federal proceedings, it would forbid the divulging of intercepted *intrastate* communications by *state* officers in *state* prosecutions regardless of local interpretations of constitutions and statutes. Cf. *Rowan* v. *State*, 175 Md. 547.

There would be a substantial question as to the constitutionality of Section 605 under the construction proposed by petitioners. Indeed, the language of the Section, if not confined to interstate and foreign communications, is general enough to apply to a purely intrastate telephone system having no connection with any interstate system. One court has already refused to adopt the construction urged by petitioners in part because of its doubts as to constitutionality. *United States* v. *Bianco*, Appendix B, *infra*, p. 71. And this Court has many times stated that legislation should be so interpreted as to avoid doubt as to its constitutional validity. *United States* v. *La Franca*, 282 U. S. 568, 574; *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 379.

It is submitted that the doctrine of the *Nardone* decision should not be extended to intrastate communications in view of the grave new difficulties, constitutional and practical, which would be involved in applying the rule to a vast new field.

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proved Nov. 8, 1938. For the debates on this amendment see Revised Record of the Constitutional Convention of the State of New York, April 5 to August 26, 1938.

II

SINCE ONE OR BOTH PARTIES TO EACH COMMUNICATION TESTIFIED AS TO THE CONTENTS, SUBSTANCE, OR PURPORT THEREOF, DISCLOSURE OF THE INTERCEPTED TELEPHONE COMMUNICATIONS WAS "AUTHORIZED BY THE SENDER" WITHIN THE MEANING OF THE SECOND CLAUSE OF SECTION 605

The record discloses that 38 of the intercepted communications were put in evidence upon the testimony of both parties to the telephone conversations. Thirty-seven of the communications were put in evidence upon the testimony of one of the parties. In other words, 75 of the 76 intercepted messages to the admission of which defendants objected were admitted only after they had been identified by at least one of the parties. The parties identifying the communications were four of the defendants, who testified for the Government (R. 129).

Clause 2 of Section 605 does not forbid the authorized publication of intercepted communications. It provides that "no person not being authorized by the sender" shall intercept any communication and divulge or publish, the existence, contents, etc., of such intercepted communication to any person. As we have heretofore pointed out (*supra*, pp. 32–35), this clause is not directed against interception as such but is aimed at the unauthorized divulging of intercepted communica-

tions. That the second clause permits the divulging of intercepted communications if the "sender" has authorized such divulging is apparent. It would seem immaterial whether there was prior authorization for the interception or whether the interception was ratified by the authorization to divulge.

Obviously the word "sender" was not an apt word to use in connection with telephone communications. It applies rather to telegraphic and other like communications. The Communications Act, however, applies not only to one-way communications but also to two-way communications, such as telephone conversations, in which two parties are essential. Both logically and practically, the word "sender" as applied to telephone conversations would seem to be without meaning unless it applies to either party to such a communication. Thus, aside from any question of interception or any question of privilege, if two parties converse by telephone, there cannot be any doubt that either party may divulge or testify as to the complete conversation without the consent or authorization of the other. The rights of either party to divulge or testify should be no different simply because a third party has intercepted the message. Under any other construction, to give an example, an accused who was a party to an intercepted telephone conversation and whose life might depend upon the admission of such conversation in corrob-

oration of his own testimony would be deprived of the benefit of the corroborative evidence if the other party to the conversation either refused to authorize the divulging of the conversation or for some reason could not be located. We do not believe that such a result could have been intended by Congress.

It would, therefore, seem that the word "sender" as used in the second clause of Section 605 should be so construed as to permit the divulging of the telephone conversation in court where either party thereto has sanctioned such divulging. If this be so, the divulging in court of 75 of the 76[21] communications (R. 129) was "authorized by the sender" within the meaning of the clause.

Petitioners argue at length that there was a vio-

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[21] If the Government's interpretation be accepted, the only communication the divulging of which may not accurately be said to have been "authorized" by the sender is Government's Exhibit 307 (R. below 3102–3103). This communication was between the petitioners Gross and Weiss. It was identified by the defendant Spitz, who, while in Weiss' office, overheard his end of the conversation and testified to what he heard (R. below 1333–1335). Subsequently the exhibit was admitted during the cross-examination of the petitioner Gross over his objection (R. below 2113–2114). While this communication related to fees to be charged by Weiss and indicated that Gross was a "runner" for Weiss, we submit that this single communication cannot be said to have been prejudicial to either Weiss or Gross, since it is apparent from the opinion below that there was ample evidence, other than this communication, to establish the conspiracy and scheme charged and to connect both petitioners therewith (R. 124, 125).

lation of the second clause of Section 605 by the interception and divulging of the communications prior to their admission in evidence. We are, of course, here concerned only with the question whether their divulging in court was authorized. They also assert that the defendants who testified for the Government were induced by hopes and expectations of leniency, if not by promises thereof, to give their authorization. There is clearly nothing in the record which indicates that their authorization was induced by promises of leniency (R. below 112, 596, 1127, 1408, 2577). And even if it be assumed that their authorization was induced by hopes and expectations of leniency, it is obvious that their authorization must still be deemed to be voluntary.

III

THE HOLDING IN THE OLMSTEAD CASE THAT EVIDENCE OBTAINED BY INTERCEPTING TELEPHONE COMMUNICATIONS IS NOT RENDERED INADMISSIBLE BY THE FOURTH AND FIFTH AMENDMENTS SHOULD NOT BE OVERRULED

The facts of the present case are not distinguishable from those in the *Olmstead* case which settled the constitutional issues nearly twelve years ago. In the present case, as in the *Olmstead* case, "There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses

or offices of the defendants."[25] Petitioners, therefore, ask the Court to reconsider and overrule its decision in the *Olmstead* case. They do not attempt to reargue the constitutional issues so carefully considered in that case, but rely solely upon the reasoning set forth in the dissenting opinions. The Government too accepts the view that little can be added to the thorough discussion in the *Olmstead* opinions. However, a few observations with respect to the decision may be helpful.

In the first place, although the Court in the *Olmstead* case was divided five to four on affirming the judgment below, it actually stood five to three on the question whether telephone communications

[25] 277 U. S. at p. 464. In the *Olmstead* case, the manner in which the telephone wires were tapped is described as follows (p. 456–457):

"Small wires were inserted along the ordinary telephone wires from the residences of four of the petitioners and those leading from the chief office. The insertions were made without trespass upon any property of the defendants. They were made in the basement of a large office building. The taps from house lines were made in the streets near the houses."

In the instant case the evidence likewise shows that the taps were made without any trespass upon any of the property of the petitioners (R. 64–65, 74–75, 88–89), nor do they contend that there was any invasion of their houses or offices in making such taps.

Neither in the *Olmstead* case nor in the present case did the Federal officers hold warrants authorizing the interception of communications. As is indicated later in this brief (*infra*, pp. 52–53), there is considerable doubt whether a warrant meeting the requirements of the Fourth Amendment could be issued.

were protected by the Fourth Amendment. Mr. Justice Holmes, while stating that "Courts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them", nevertheless, was "not prepared to say that the penumbra of the Fourth and Fifth Amendments" precluded the admission into evidence of intercepted telephone messages (p. 469). Moreover, with full recognition of the cardinal importance of its premises as to the necessity of personal liberty, the Government must challenge the principle enunciated in Mr. Justice Brandeis' dissent to the effect that the Fourth and Fifth Amendments confer an unrestricted "right to be let alone" (p. 478). Obviously in a community of one hundred and thirty million people the individual cannot isolate himself from a minimum of social supervision and impingement upon his privacy, and the decisions of this Court have frequently recognized limits upon the right to be let alone when balanced against the public interest in effective enforcement of the laws.

In *Hester* v. *United States*, 265 U. S. 57, this Court, in an opinion by Mr. Justice Holmes, sustained the right of Federal enforcement officials without search warrant to commit trespass upon a man's land in order to observe his activities, when there was reasonable ground to believe that the man was violating the law. In *Carroll* v. *United States*, 267 U. S. 132, this Court held that the Fourth

Amendment did not forbid prohibition agents from stopping a private passenger auto proceeding along a public highway, in order to search for and seize liquor concealed in the upholstering, although the agents acted without warrant but upon reasonable belief that the auto was being used for bootlegging. Mr. Justice Brandeis himself saw no reason to dissent from this Court's decision in *Agnello* v. *United States*, 269 U. S. 20, although the arrests in this case were made without warrant after the Government's agents, by looking through the windows into the house of one of the defendants, saw the defendants selling cocaine. Nor did the Court regard the use of a search light to find out what was going on on a small boat at sea as a search within the meaning of the Fourth Amendment. *United States* v. *Lee*, 274 U. S. 559. Yet the use of the telephone pick-up is only an aid to hearing as the search light is an aid to seeing. Both invade privacy equally, except so far as those whose conduct is observed are aware of the surveillance. This, however, cannot lead to a different result, for the element of secret observation was present as fully in the *Agnello* case as in the *Olmstead* case.

To Mr. Justice Brandeis' fear of the effects of scientific progress in crime detection upon privacy (p. 474) we can reply only that when men learn to see through walls and to read thoughts, these faculties will be employed by criminals against society and society should be able to protect itself by the

same weapons. Liberty of the individual lies not so much in a man's right not to have his words and thoughts known in a court of law but in a firm protection of freedom of speech and of thought. Possible abuse of powers conferred upon law officers is an argument for punishing abuse, not for eliminating a useful power.[37]

With reference to the other arguments contained in the opinions of Mr. Justice Brandeis and Mr. Justice Butler, we believe that they were sufficiently met in the opinion of the Chief Justice.

We submit, therefore, that the *Olmstead* case was rightly decided. This Court cited it as authority only two years ago. *Isbrandtsen-Moller Co.* v. *United States*, 300 U. S. 139, 145. The *Nardone* decision itself embodies a reaffirmation of the holding in the *Olmstead* case, since the Court rested its decision squarely on Section 605 of the Communications Act, and recognized a distinction between practices forbidden by Section 605 and those forbidden by the Amendments by saying (p. 383):

> The same considerations may well have moved the Congress to adopt § 605 as evoked the guaranty against practices and procedures violative of privacy, embodied in the Fourth and Fifth Amendments of the Constitution.

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[37] Compare Mr. Justice Holmes' treatment of the "abuse argument" as applied to the question of state taxation of Federal instrumentalities: "The power to tax is not the power to destroy while this Court sits." *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, 223.

Finally, it is worth noting that the decision of the majority in the *Olmstead* case has received the considered approval of outstanding commentators on constitutional law.[*]

We strongly urge that this Court should not now enlarge the scope of the Fourth and Fifth Amendments to include a prohibition against the admission of evidence obtained by intercepting telephone communications. Heretofore this Court has clearly recognized that the interception of communications and the admission of evidence obtained thereby, present subjects to be dealt with by Congress in accord with its legislative policy. In *Olmstead* v. *United States, supra* (at pp. 465–466) this Court said:

> Congress may of course protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, and thus depart from the common law of evi-

[*] Corwin, The Supreme Court's Construction of the Self-incrimination Clause, in Selected Essays on Constitutional Law, Vol. 2, at p. 1414 (reprinted from 29 Mich. L. Rev., pp. 1, 191); Willis on Constitutional Law (1936), p. 539; Wigmore, 23 Ill. L. Rev. (1928), p. 377 (reprinted in Wigmore on Evidence (2nd ed.), 1934 Supp., § 2184b, p. 948. For other comments approving the *Olmstead* decision, see 27 Mich. L. Rev. 78 (1928); 13 Minn. L. Rev. 58 (1928); and 38 Yale L. Jour. 77 (1928). The Yale Note concludes: "The suggestion of the minority that 'dirty business' of this type should be severely punished will readily be agreed to. But the history of the federal rule indicates that practical convenience and logical consistency will be better served if relevant evidence is held admissible and the offenders who obtained it are dealt with in less devious ways."

dence. But the courts may not adopt such a policy by attributing an enlarged and unusual meaning to the Fourth Amendment.

In *Nardone* v. *United States, supra,* at p. 383, this Court again declared that the question was one of policy for Congress.

A holding by this Court that the obtaining of evidence by the interception of telephone communications violates the Fourth and Fifth Amendments would not only overrule its well considered opinion in the *Olmstead* case but would probably result in forever precluding Congress from legislating upon the subject. For it is evident, as Chief Justice Taft pointed out in the *Olmstead* case [p. 464], that the searches and seizures dealt with in the Fourth Amendment are searches and seizures of material things; and the safeguards there thrown about the use of warrants are appropriate only to such searches and seizures: the warrant must particularly describe "the place to be searched, and the persons or things to be seized." This view is borne out by the Espionage Act of June 15, 1917, c. 30, Title XI, 40 Stat. 228 (U. S. C., Title 18, §§ 611–633) which is the general statute governing Federal search warrant procedure. The relevant provisions of this Act evidently represent a Congressional interpretation of the scope of the Fourth Amendment. Accordingly, it is significant that the issuance of the warrant is authorized only for property stolen or embezzled, property "used as the means of committing a felony", and property

or papers held for the purpose of aiding a foreign government (U. S. C., Title 18, § 612).[29] Congress was here but following the precept of this Court, which has many times pointed out that the Fourth Amendment forbids a search, with or without warrant, purely for *evidence,* as distinguished from a search for contraband, instruments of committing crimes, articles subject to forfeit for nonpayment of duty or other things in which the Government can assert some proprietary interest. *Boyd* v. *United States,* 116 U. S. 616, 623–624, 630–633; *Gouled* v. *United States,* 255 U. S. 298, 308–312; *United States* v. *Lefkowitz,* 285 U. S. 452, 467. If, then, a warrant must particularly describe the thing to be seized, and if even a warrant issued on probable cause cannot constitutionally authorize a search for evidence as such, it would seem impossible for Congress to adopt any procedure, however safeguarded, which would permit wire tapping. It is not necessary to remind this Court that we live in a time of international crisis and that situations may well arise where Congress will be faced with the necessity of authorizing the use of wire tapping for purposes so basic as to aid in the preservation of our national security by counter-espionage measures.

"It must be remembered," said Mr. Justice Holmes in *Missouri, Kansas & Texas Ry. Co.* v. *May,* 194 U. S. 267, 270, "that legislatures are ulti-

[29] See also provisions of the Espionage Act for inventory of property seized, return of property unlawfully seized, etc.

mate guardians of the liberties and welfare of the people in quite as great a degree as the courts." And in discussing the restrictions upon the Constitutional spending power in *United States* v. *Butler*, 297 U. S. 1, 87, Mr. Justice Stone added, "Another is the conscience and patriotism of Congress and the Executive." The use of wire tapping, we insist as well as concede, contains the possibility of grave abuse. A government bent on oppression would find it a convenient instrument to add to its arsenal of weapons for accomplishing that oppression. But, by the same token, each of the powers of government may be perverted from its purpose and directed to oppression. An enlightened people, acting through a responsible legislature and executive, is the ultimate safeguard of liberty.

The Constitution, it is true, has forbidden a number of governmental actions which by their nature and history had been shown to contain a risk of oppression greater than that which was warranted by their utility in law enforcement. The interception of telephone messages cannot be included among these. Criminal organization grows in complexity as does the economic society generally. We cannot believe that the Constitution is intended to remove beyond official access an instrument so universally useful in the commission of crime as the telephone. The legislature and the executive, and, should they fail, the courts, can guard against oppression if ever the use of wire tapping should be

pressed beyond the legitimate bounds of society's defense against organized crime. We think this defense should not be sacrificed to speculative fears of future abuse, any more than should the other powers of government, and that the *Olmstead* case should not be overruled.

IV

THE INTERCEPTED TELEPHONE COMMUNICATIONS WERE ADMISSIBLE EVEN IF OBTAINED IN VIOLATION OF STATE STATUTE

Petitioners assert that wire tapping by Federal officers is made a crime by New York statute (Consol. Laws N. Y. Chap. 40, § 1423, Par. 6, Appendix A, *infra;* pp. 68–69), and that therefore evidence obtained by such wire tapping should be held inadmissible in a Federal court. They ask that the well-settled common-law rule applied by this Court in the *Olmstead* case, i. e., "that the admissibility of evidence is not affected by the illegality of the means by which it was obtained" (p. 467), be changed so as to bar evidence alleged to have been obtained as the fruits of crime.[20]

It is not true, as petitioners state (Br. 36–37), that the majority of the Court in the *Olmstead* case construed the state statute there involved (Wash-

[20] Petitioners contend for no modification of the common-law rule so as to exclude evidence alleged to have been obtained by unethical methods, and admit that "nice ethical conduct" in the acquisition of evidence is doubtless too high a standard (Br. 37).

ington)[31] to apply to wire-tapping by Federal officers. On the contrary it declined to decide whether the Washington statute applied to Federal officers, saying (p. 469):

> Whether the State of Washington may prosecute and punish federal officers violating this law * * * is not before us.

Likewise, there is no basis for the petitioners' assertion that the equally general provisions of the New York statute make it an offense for Federal officers to tap wires in the detention of crime. They cite no state decision which supports this assertion. In fact, such state authority as exists would seem to recognize the right of law enforcement officers to tap wires for the purpose of apprehending criminals (*People* v. *Hebberd*, 96 Misc. 617, 620–621, Sup. Ct. N. Y.), or to compel the disclosure by employees of telephone companies of the contents of communications utilized in the perpetration of crime. Consol. Laws of N. Y., Chap. 40, § 552, Appendix A, *infra*, pp. 67–68.

In any event, the application of the New York wire-tapping statute to Federal officers would be doubtful,[32] and this Court should not attempt to

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[31] That statute, adopted in 1909, provides:

"Every person * * * who shall intercept, read, or in any manner interrupt or delay the sending of a message over any telegraph or telephone line * * * shall be guilty of a misdemeanor." (Remington Compiled Statutes, 1922, § 2656).

[32] See *Tennessee* v. *Davis*, 100 U. S. 257; *In re Loney*, 134 U. S. 372; *In re Neagle*, 135 U. S. 1; *Boske* v. *Comingore*, 177 U. S. 459.

construe the statute, unless such construction is essential to its decision. *Rowley* v. *Chicago & Northwestern Ry.*, 293 U. S. 102, 104–105; *Porter* v. *Investors Syndicate*, 287 U. S. 346, 347; see also *Erie R. Co.* v. *Tompkins*, 304 U. S. 64.

We submit that in the instant case it is not essential to determine whether the New York statute applies to Federal officers since even if it be assumed *arguendo* that it does, this fact does not render inadmissible the evidence in controversy."[11] It is, of course, the accepted common law rule, reasserted by this Court in the *Olmstead* case, that the admissibility of evidence is not affected by the illegality of the means by which it was obtained. That in Federal courts this rule applies to evidence obtained by violation of statute is clear from the following statement in the *Olmstead* decision (p. 468):

> * * * the exclusion of evidence should be confined to cases where rights under the Constitution would be violated by admitting it.

In seeking to have this Court create an exception to the accepted rule which would render inadmissable evidence obtained by Federal officers in violation of state statutes, petitioners rely primarily upon the view expressed by the dissenting justices

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[11] It should be noted that the New York statute cited by petitioners does not declare that evidence obtained by wire tapping is inadmissible in a state court. Cf. *People* v. *McDonald*, 177 App. Div. 806, 809–810 (N. Y.); *Matter of Davis*, 252 App. Div. 591, 598 (N. Y.).

in the *Olmstead* case. While this Court has recognized that it has the power in the absence of congressional legislation to formulate and declare modern rules of evidence for the Federal courts in the light of altered conditions, particularly where the common law rule has become outmoded or has outlived the reason for its adoption (*Funk* v. *United States*, 290 U. S. 383–384), the petitioners in the instant case have made no showing that the common law rule which they seek to have modified is out of harmony with the current trend of criminal jurisprudence. Indeed, our examination discloses that this rule of the common law is still in force in England, in Canada, and in this country, except that in the Federal courts and in some of the state courts evidence is excluded when obtained in violation of constitutional provisions.[24] No legislation or decision has been found outlawing evidence obtained merely in violation of a statute as

[24] *Olmstead* v. *United States*, *supra* (p. 467); *People* v. *Defore*, 242 N. Y. 13, 21; Wigmore on Evidence (2d ed.), Vol. IV, Sec. 2183; Jones, Commentaries on Evidence (2d ed.), Vol. V, Sec. 2075, Note 6; Underhill's Criminal Evidence (4th ed.), Sec. 796–798; Use of Evidence Obtained by Illegal Search and Seizure, Vol. 8, Am. Bar Ass'n J., p. 479, Aug. 1922, collecting the English and Canadian, and Federal and state cases. It is significant that nowhere in any of the dissenting opinions is there any indication that the modern trend of legislation and judicial decision is contrary to the common law doctrine. Indeed, the burden of the dissenting opinions considering the question is in effect that there should never have been any such rule, at least so far as law enforcement officers are concerned.

contrasted with the violation of a constitutional provision. Nor have petitioners shown any fundamental alteration of conditions with respect to telephonic communications since the decision in the *Olmstead* case which would justify the adoption of the exception which they advocate. In 1927, immediately prior to the *Olmstead* decision, there were in this country 155 telephones per thousand population, while in 1937 (the last date for which figures are available) there were 150 per thousand. Also, in 1927 there were 246 telephone calls per capita, while in 1937 there were 255 per capita.[35] It is evident, therefore, that there has not been that fundamental change of conditions which would warrant any modification of the common law rule applied in the *Olmstead* case.

V

THE CHALLENGED TESTIMONY WAS ADMISSIBLE EVEN IF THE FEDERAL COMMUNICATIONS ACT OR THE FOURTH AND FIFTH AMENDMENTS BE CONSTRUED TO BAR INTRODUCTION INTO EVIDENCE OF INTERCEPTED INTRASTATE TELEPHONE COMMUNICATIONS

Although for the sake of convenience we have heretofore referred to the evidence in controversy as "intercepted telephone communications," a significant distinction between the present case and the "wire tapping" cases previously decided by this Court lies in the fact that the witnesses who testified

[35] Census of Electrical Industries, 1937, Telephones and Telegraphs, U. S. Dept. of Commerce (U. S. Government Printing Office, 1939), pp. 12, 13.

to the telephone communications at the trial were parties to the conversations." These witnesses "intercepted" no telephone calls. They invaded no one's constitutional rights. Each disclosed only what he said and what he heard in a perfectly lawful manner.

It will be protested against this suggestion (1) that the Government used transcripts and phonographic recordings of intercepted telephone calls to refresh the witness' recollection, and (2) that the transcripts and recordings were themselves admitted into evidence. The answer to the first point is found, we submit, in the general rule, conceded by defense counsel at the trial (R. 38), that a memorandum may be used to refresh a witness' recollection even if it is itself not competent evidence. *Putnam* v. *United States*, 162 U. S. 687, 694–695; *Nicoli* v. *Briggs*, 83 F. (2d) 375, 378 (C. C. A. 10th); *State* v. *Hale*, 85 N. H. 403, 408; *Commonwealth* v. *McDermott*, 255 Mass. 575, 580–581.

With regard to the actual admission into evidence of the phonograph records and the corresponding typewritten transcripts, two courses of reasoning are open:

(1) If the witness testified to the conversation from an actual present recollection, refreshed by whatever means, the subsequent admission into evidence of records and transcripts which repeated

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[16] With the single exception noted at p. 45, *supra*.

what was already properly before the jury certainly cannot have harmed the defendants. Reason and statute alike forbid a reversal for so technical an error. U. S. C., Title 28, Sec. 391. See especially *United States* v. *Reed*, 96 F. (2d) 785 (C. C. A. 2d) certiorari denied, 305 U. S. 612 (intercepted telephone call testified to by parties and subsequently by interceptor); *Sneierson* v. *United States*, 264 Fed. 268 (C. C. A. 4th), certiorari denied, 253 U. S. 490, holding that the error, if any, in permitting certain stenographic notes to be read to the jury was nonprejudicial in view of the fact that the stenographer who testified could properly have used his notes to refresh his recollection; *Laughter* v. *United States*, 259 Fed. 94 (C. C. A. 6th), certiorari denied, 249 U. S. 613, holding that the denial of defendants' motion for return of papers seized in violation of the Fourth Amendment was error, but not prejudicial when the only paper introduced at the trial tended to prove a point otherwise established by competent testimony; and *Ableman* v. *American Sugar Refining Co.*, 9 F. (2d) 318 (C. C. A. 5th).

(2) If, on the other hand, the witness in reading the transcript to the jury is testifying not to a current recollection refreshed by the transcript but from a memorandum which embodies a memory he once had, then under well-established principles of evidence the memorandum itself is admissible. See, *e. g.*, *Schoborg* v. *United States*, 264 Fed. 1 (C. C. A. 6th), certiorari denied, 253 U. S. 494.

Defense counsel conceded the general rule at the trial but attacked the sufficiency of the foundation which had been laid for the use of the phonograph records and transcripts as memoranda of past recollection recorded (R. 33, 39). However, this point was apparently not urged before the Circuit Court of Appeals, and it is not mentioned in the petition or brief on the merits filed by petitioners in this Court. Accordingly, all objection to this material based on the memorandum rule must be deemed abandoned, leaving for consideration only the question whether the allegedly unlawful method by which the memorandum was prepared bars its use as an embodiment of the witness' recollection. Only by taking the extreme position that any illegality during the course of the pre-trial investigation vitiates the criminal proceeding can such a view be maintained. The testimony, whether present recollection refreshed or past recollection recorded, is still the testimony of the witness, a party to the conversation. Its weight depends on his credibility, not that of Federal officers who may have tapped the telephone wires. It is as if in the present case the witness had refreshed his memory before trial from the phonograph records sufficiently to testify as to the conversation without the assistance of either record or transcript, or as if the Government had learned the name of a material witness from an involuntary confession inadmissible under the Fifth Amendment. The testimony of such a witness could hardly be barred on this

ground. See *The King* v. *Lockhart*, 1 Leach 386, 168 Eng. Rep. 295 (Old Bailey 1785).[37]

It should be noted that the foundation for the challenged testimony was fully presented and the legal questions argued only in connection with Government's Exhibit No. 110. It is fair to assume that the same foundation could and would have been laid for the admission of subsequent phonograph records and transcripts, since it was agreed that the objections against Government's Exhibit 110 should apply to the others, and no new objection was made when thereafter the prosecuting attorney, as a matter of convenience and to save time, introduced the records and transcripts simply upon identification by the witness.

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[37] It is evident from a reading of the printed record that counsel, witnesses, and even the trial judge were uncertain as to the theory upon which the phonograph records and related transcripts were admitted into evidence. This uncertainty was the natural result of the doubt as to whether the records actually revived the present recollection of the witness. It would probably be impossible in the circumstances of this case to differentiate clearly between the witness' actual present recollection of having said something and his powerful conviction that he did say it flowing from a hearing of his own recorded voice. In this situation the distinction between refreshed present recollection and recorded past recollection becomes academic and it is not to be wondered that the trial court having asked the witness to "refresh his recollection word by word" should thereupon direct him to "read" the refreshing memorandum. In any event, objection on the ground that a refreshing memorandum is not ordinarily read into the record has been abandoned by petitioners both before this Court and before the Circuit Court of Appeals.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed, except as to the petitioner Krupp.[28]

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[28] As was pointed out in Footnote 1, p. 1, *supra*, this petitioner has died since the writ of certiorari was granted. In the cases of *List* v. *Pennsylvania*, 131 U. S. 396, and *Menken* v. *Atlanta*, 131 U. S. 405, which were criminal cases, the deaths of the defendants, who were plaintiffs in error in this Court, were suggested subsequent to the issuance of the writs of error. This Court held that the causes had abated and that the writs of error must be dismissed. See also *Lewis* v. *United States*, 216 U. S. 611; *United States* v. *Phillips*, 6 Pet. 776; *Jezewski* v. *United States*, 13 F. (2d) 599, 604 (C. C. A. 6th). However, in *Brownlow* v. *Schwartz*, 261 U. S. 216, 218, this Court indicated, in a civil case which had become moot, that "The practice now established by this Court * * * is to reverse the judgment below and remand the case with directions to dismiss the bill, complaint, or petition." See also cases cited in Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, pp. 437–438.

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

The Fifth Amendment provides, so far as pertinent:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

Section 27 of the Radio Act of 1927 (the Act of February 23, 1927, c. 169, 44 Stat., 1162, 1172), provides:

> No person receiving or assisting in receiving any radio communication shall divulge or publish the contents, substance, purport, effect, or meaning thereof except through authorized channels of transmission or reception to any person other than the addressee, his agent, or attorney, or to a telephone, telegraph, cable, or radio station employed or authorized to forward such radio communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the radio communication may be

passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any message and divulge or publish the contents, substance, purport, effect, or meaning of such intercepted message to any person; and no person not being entitled thereto shall receive or assist in receiving any radio communication and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcasted or transmitted by amateurs or others for the use of the general public or relating to ships in distress.

Regulation Nineteenth of Section 4 of the Radio Act of 1912 (the Act of August 13, 1912, c. 287, 37 Stat. 302, 307), provides:

Secrecy of Messages. Nineteenth. No person or persons engaged in or having knowledge of the operation of any station or stations, shall divulge or publish the contents of any messages transmitted or received by such station, except to the person

or persons to whom the same may be directed, or their authorized agent, or to another station employed to forward such message to its destination, unless legally required so to do by the court of competent jurisdiction or other competent authority. Any person guilty of divulging or publishing any message, except as herein provided, shall, on conviction thereof, be punishable by a fine of not more than two hundred and fifty dollars or imprisonment for a period of not exceeding three months, or both fine and imprisonment, in the discretion of the court.

Section 7 of the Interstate Commerce Act of 1910 (the Act of June 18, 1910, c. 309, 36 Stat. 539, 544–545), so far as pertinent, provides:

> * * * the provisions of this Act shall apply * * * to telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one State, Territory, or District of the United States, to any other State, Territory, or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this Act, * * *: *Provided, however,* That the provisions of this Act shall not apply * * * to the transmission of messages by telephone, telegraph, or cable wholly within one State and not transmitted to or from a foreign country from or to any State or Territory as aforesaid.

Consol. Laws N. Y., Chap. 40, § 552, so far as pertinent, provides:

> A person who:
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> * * * * *
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> 2. Being such clerk, operator, messenger or other employee [of a telegraph or tele-

phone company], wilfully divulges to anyone but the persons for whom it was intended, the contents or the nature thereof of a telegraphic or telephonic message or dispatch intrusted to him for the transmission or delivery, * * * except when such telegraphic or telephonic message or dispatch is in aid of or used to abet or carry on any unlawful business or traffic, or to perpetrate any criminal offense, and when it shall appear that any offense at law or unlawful business or traffic is being carried on or conducted in whole or in part by means of a telegraphic or telephonic message or dispatch, it shall be the duty of any corporation or employee having knowledge of the same, to withhold such dispatch from delivery, and to further furnish to any public officer whose duty it is to prosecute any offense at law so aided and abetted, all information in their possession, relating to said unlawful business or traffic; * * * and any violation of this section, or refusal or neglect to furnish information as provided hereinbefore, is punishable by a fine of not more than one thousand dollars or by imprisonment for not more than two years, or by both such fine and imprisonment.

Consol. Laws N. Y., Chap. 40, § 1423, so far as pertinent, provides:

A person who wilfully or maliciously displaces, removes, injures, or destroys:

* * * * *

6. A line of telegraph or telephone, wire or cable, pier or abutment, or the material or property belonging thereto, without lawful authority, or shall unlawfully and wilfully cut, break, tap, or make connection with any telegraph or telephone line, wire

cable or instrument, or read or copy in any unauthorized manner any message, communication or report passing over it, in this state; or who shall wilfully prevent, obstruct or delay, by any means or contrivance whatsoever, the sending, transmission, conveyance or delivery, in this state, of any authorized message, communication or report by or through any telegraph or telephone line, wire or cable, under the control of any telegraph or telephone company doing business in this state; or who shall aid, agree with, employ or conspire with any person or persons to unlawfully do, or permit or cause to be done, any of the acts hereinbefore mentioned, or who shall occupy, use a line, a room, table, establishment or apparatus to unlawfully do or cause to be done any of the acts hereinbefore mentioned * * *.

APPENDIX B

Pertinent portions of the unreported opinion of the United States District Court for the Eastern District of Missouri in *United States* v. *Bianco,* decided January 13, 1938, wherein the court denied a motion to quash the indictment:

* * * * *

Defendant relies upon the opinion of the Supreme Court, delivered by Mr. Justice Roberts, on December 20th, 1937, in the case of *Nardone et al.* v. *U. S.,* as an authority to sustain defendant's motion to quash. The opinion in the *Nardone* case states that Federal agents testified to the substance of intercepted interstate communications overheard by the witnesses who had intercepted the message by tapping telephone wires. It is our opinion that the decision in the *Nardone* case relates only to interstate communications. Section 605, Title 47, U. S. C. A., does provide in the second clause: "And no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person." But that clause is to be read in connection with the other clauses, which refer specifically to interstate communications.

Odious and abhorrent as is the practice of the invasion of the privacy of the citizen by wire tapping, we feel that there is nothing in the *Nardone* case relative to intrastate

communications, which is what we have to consider in the case at bar; and we are bound by the opinion of the Court, rendered by Chief Justice Taft, in *Olmstead* v. *U. S.*, 277 U. S. p. 438, which opinion passes upon the question of whether or not wire tapping is in violation of the Fourth Amendment of the Constitution of the United States.

* * * * *

It is our opinion that the second clause of Section 605, which provides that no person, not being authorized by the sender, shall intercept any communication and divulge the same, relates only to interstate communications, and had Congress attempted to make such clause applicable to intrastate communications it would have been invalid.

For the reason that we believe the opinion in the *Nardone* case relates only to interstate communications, and that on the authority of the *Olmstead* case the common law still obtains as to intrastate communications, the motion to quash is overruled.

GEORGE H. MOORE,
U. S. District Judge.

U. S. GOVERNMENT PRINTING OFFICE: 1939

SUPREME COURT OF THE UNITED STATES.

No. 42.—October Term, 1939.

Joseph J. Weiss, Martin Gross, George Krupp and Maximilian Goldstein, Petitioners,
vs.
The United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[December 11, 1939.]

Mr. Justice Roberts delivered the opinion of the Court.

The petitioners were indicted, with five others, in the District Court for the Southern District of New York for using the mails to defraud and for conspiracy so to use them.[1] The alleged scheme was to cheat insurance companies by inducing them to pay false claims for disability, health, and accident benefits to three of the defendants, Nelson, Berger, and Spitz. These three pleaded guilty and testified for the Government. Three defendants who were physicians,—Messman, Goldstein, and Krupp—were alleged to have assisted by furnishing policy holders false medical certificates and instructing them how to simulate illness. Messman pleaded guilty and testified for the Government. The other two stood trial. Two lawyers, Joseph J. Weiss, and Alfred L. Weiss, and an investigator, Gross, were charged with having furthered the claims knowing them to be false. Alfred L. Weiss was granted a severance; Joseph J. Weiss and Gross stood trial. Each of the petitioners was convicted and sentenced. The judgments were affirmed by the Circuit Court of Appeals.[2]

The conspiracy and scheme charged covered a period extending from January 15, 1934, to July 30, 1937, the date of the indictment. The principal issue of fact was whether the petitioners participated in making false claims with guilty knowledge. Over objection and exception, the trial judge admitted evidence of seventy-six intercepted telephone communications.

For months prior to the finding of the indictment telephone messages over the wires leading into the offices of Weiss and Messman in

[1] Under U. S. C. Tit. 18, §§ 338 and 88.
[2] 103 F. (2d) 348.

New York City, were intercepted. The wires were tapped by a policeman acting under instructions of a United States Post Office Inspector. The intercepted messages were taken stenographically and were also simultaneously recorded on phonograph discs by employes of a detective agency acting under the same instructions. Each night the records and stenographic transcripts of communications intercepted during the day were delivered to the United States Attorney or his representative. Interstate calls were made from Weiss' office and the tapped wires were the conduits of both interstate and intrastate communications. Every call, whether interstate or intrastate, to or from Weiss' office, was intercepted and recorded.

It appeared at the trial that one of the defendants who pleaded guilty had been confronted with the phonographic records and had then decided to plead guilty and become a witness for the Government. Others who had been informed of the Government's possession of the records did likewise. In the preparation for trial one of the defendants, who was to testify for the prosecution, held a typed copy of the stenographic transcript of a telephone conversation in which he had participated while a phonographic record of the conversation was played to him. He corrected the typed manuscript to make it conform to the words emitted from the phonograph. He then marked the phonographic record and the script for identification.

The Government's procedure at the trial in proving the communications was to call as a witness one of the defendants who had pleaded guilty, and to hand him a transcript he had marked for identification. After he had testified that, on a given date, he held a telephone conversation with one of the other defendants, he was asked whether he could repeat the conversation verbatim. Upon his stating that he could not do so without the use of the typed transcript he was permitted to read it to the jury. Subsequently the Government offered the identified phonograph records and typewritten transcripts in evidence and they were admitted. Certain of the records were played to the jury while each juryman held a copy of the typewritten transcript of the conversation. All of the communications in question are conceded to have been intrastate save one which, however, was not shown to have been interstate.

The petitioners' objections to the admission of this evidence were that it would violate Sec. 605 of the Federal Communications Act of 1934;[3] would violate the Fourth and Fifth Amendments of the Federal Constitution, and would be in the teeth of Sec. 1423, subdivision 6, of the Penal Law of the State of New York,[4] making wire tapping a crime.

Because of conflict of decision in the Circuit Courts of Appeal[5] we granted certiorari, limited to the "question whether the trial court properly received in evidence intercepted telephone communications."[6]

In *Nardone* v. *United States*, 302 U. S. 379, it was decided that Sec. 605 of the Federal Communications Act prohibited the reception in a federal court of evidence of interstate communications obtained by federal agents by tapping telephone wires. The petitioners assert, and the respondent denies, that the section bars evidence of intrastate communications similarly obtained. The Government further claims that, even if the section would otherwise bar the evidence, it does not have that effect in this case, because interception and divulgence of the messages put in evidence was "authorized by the sender" within the meaning of the section.

The section consists of four clauses separated by semicolons. The pertinent one is the second: "and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person;". Plainly the interdiction thus pronounced is not limited to interstate and foreign communications. And, as Congress has power, when necessary for the protection of interstate commerce, to regulate intrastate transactions,[7] there is no constitutional requirement that the scope of the statute be limited so as to exclude intrastate communications.

The petitioners and the Government alike refer to the context of the critical clause, and the legislative history of the Communications

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[3] c. 652, 48 Stat. 1064, 1103; U. S. C. Tit. 47, Sec. 605.

[4] Thompson's Laws of New York, 1939, Part I, p. 1969.

[5] Valli v. United States, 94 F. (2d) 687; Diamond v. United States, 94 F. (2d) 1012, and unreported opinion on petition for rehearing; Sablowsky v. United States, 101 F. (2d) 183.

[6] — U. S. —.

[7] Shreveport Case, 234 U. S. 342, 351, 353; United States v. Louisiana, 290 U. S. 70, 75; National L. R. Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 38.

Act, the former to demonstrate that all communications are protected from interception and divulgence, the latter to prove that the language of the Act must be more narrowly interpreted to cover only interstate and foreign communications.

In support of the petitioners' view it is pointed out that each clause of Sec. 605 is complete in itself; that in the first and third clauses, which deal with divulgence of messages by persons engaged in receiving or transmitting them, the communications are specified as "any interstate or foreign communication", whereas, in the second and fourth clauses, which deal with interception and divulgence of communications, the phrases used are "any communication" and "such intercepted communication." It is argued that the difference in phraseology must have significance; and, in support of the assertion that the variety of expression was not due to inadvertence, the petitioners call attention to the fact that Sec. 605 was taken over from Sec. 27 of the Radio Act of 1927,[8] which, referring to radio messages, used uniformly, in each clause, the term "communication" or "message" and nowhere qualified the designation by the use of the phrase "in interstate or foreign commerce."

The petitioners further urge that there is good reason for the distinction in the phrasing of the clauses in § 605 since persons employed by communication companies can distinguish between interstate and intrastate messages which they handle, whereas, inasmuch as messages of both sorts pass indiscriminately over the same wires, the interceptor cannot make a similar distinction and the only practicable way to protect interstate messages from interception and divulgence is to prohibit the interception of all messages.

The Government argues that a reading of the whole section makes it plain that to give the second clause the scope contended for by the petitioners will lead to incongruities and inconsistencies in the operation of the section. We find none such as are sufficient to countervail what appears to be the plain meaning of the second clause.

The Government correctly asserts that the main purpose of the Communications Act of 1934 was to extend the jurisdiction of the existing Radio Commission to embrace telegraph and telephone communications as well as those by radio. We are asked to hold that if Congress had intended to make so drastic a change as to

[8] Act of Feb. 23, 1927, 44 Stat. 1162, 1172.

regulate intrastate as well as interstate communication, both the legislative history of the Act and its phraseology would so indicate, whereas there is nothing in either to emphasize any such extension of authority. We think, however, that the legislative history does not serve to explain the difference in the wording of the various clauses of Sec. 605. In making the alterations in the phraseology of the similar section of the earlier act the Congress must have had some purpose. We cannot conclude that the change in the wording of two of the four clauses of the section was inadvertent.

The Government further contends that the Act, viewed as a whole, indicates an intent to regulate only interstate and foreign communication. The title and sections 1 and 2, with a single exception which serves to emphasize the distinction, expressly so declare. But we think these considerations are not controlling in the construction of Section 605. The Commission's regulatory powers and administrative functions have to do only with interstate and foreign communications. But Section 605 delegates no function and confers no power upon the Commission. It consists of prohibitions, sanctions for violation of which are found in Section 501.[9] We hold that the broad and inclusive language of the second clause of the section is not to be limited by construction so as to exclude intrastate communications from the protection against interception and divulgence.

We come, then, to the Government's second proposition,—that disclosure of the intercepted communications was "authorized by the sender" within the meaning of the clause. It is true that one or both of the parties to each of the admitted communications attested in the manner we have indicated to the intercepted conversations. This is said to amount to a consent to the divulgence of the subject matter and to satisfy the statute in that respect. We think the position is untenable. The Act contemplates voluntary consent and not enforced agreement to publication. The participants were ignorant of the interception of the messages and did not consent thereto. The contents of the stenographic transcripts and phonographic records were, prior to the trial, made available to Government agents and United States attorneys. This divulgence was not consented to by either of the

[9] 48 Stat. 1100, 47 U. S. C. Sec. 501.

parties to any of the telephone conversations. In the absence of such divulgence the Government would have been without the evidence embodied in the messages.

It is said, however, that, when some of the defendants pleaded guilty, elected to take the stand and to testify to the contents of the messages, they gave the authorization contemplated by the statute. We have already adverted to the method by which this supposed authorization was obtained. Certain of the defendants who were participants in the telephone conversations were informed of the Government's possession of the contents of their communications. Under the stress of this situation they determined to turn state's evidence. Messman's license to practice medicine has not been revoked; he was not required to plead to the indictment; he was paid a salary by the Government, first of $65.00 per week and later of $100.00 per week, amounting, in the total, to $3,237.12. Nelson's sentence was suspended. He was paid a salary of $50.00 per week. Berger's sentence was suspended. Spitz's sentence was suspended.

Statement of these facts is convincing that the so-called authorization consisting of the agreement to turn state's evidence, by some of the defendants after they had been apprised of the knowledge of their communications by the Government's representatives, and in the hope of leniency, was not that intended or described by the statute and emphasises the offensive use which may be made of intercepted messages, whether interstate or intrastate. It is not too much to assume the interdiction of the statute was intended to prevent such a method of procuring testimony.

We hold that Section 605 rendered the communications inadmissible, and that it was prejudicial error for the trial court to admit them either by permitting the defendants who turned state's evidence to read the transcripts or allowing the prosecutor to put the transcripts and phonographic records into evidence upon identification by the parties to the conversations.

We have no occasion to consider or decide the questions raised by the other objections of the petitioners to the admission of the evidence.

The judgments are reversed and the cause is remanded to the District Court for further proceedings in conformity with this opinion.

Reversed.